IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCATION, et al. Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and SCOTT PRUITT, Administrator, United States Environmental Protection Agency, Defendants.	Case No.: 1:11-CV-01548-ABJ

EPA'S REPLY IN SUPPORT OF CROSS-MOTION
TO TERMINATE THE PARTIAL CONSENT DECREE

The Clean Air Act ("CAA" or "Act") establishes a bifurcated system of judicial review. Jurisdiction to compel EPA to act in the first instance and jurisdiction to review EPA's actions once taken lie in different courts. Specifically, if EPA fails to perform a nondiscretionary duty, a district court may order EPA to do so and set a deadline for agency action. 42 U.S.C. § 7604(a)(2); *see also Sierra Club v. Browner*, 130 F. Supp. 2d 78, 82, 90 (D.D.C. 2001), *aff'd*, 285 F.3d 63 (D.C. Cir. 2002). Once EPA has acted, however, jurisdiction passes from the district court. *See Illinois v. Gorsuch*, 530 F. Supp. 337, 339 (D.D.C. 1981) (EPA's promulgation of regulations pursuant to court order entered in deadline suit "brought [the] proceeding to a close" as to those regulations), *aff'd without opinion*, 684 F.2d 1032 (D.C. Cir. 1982); *see also Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 812-13 (D.C. Cir. 1983) (upholding district court on this point). Claims that EPA erred substantively or procedurally when it acted must then be pursued in the appropriate court of appeals, in some cases only after having first been presented to the Agency itself. 42 U.S.C.

7607(b)(1), (d)(7)(B), (d)(8), (d)(9)(D); *see also Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 (D.C. Cir. 2015).

Plaintiffs filed this suit alleging that EPA had failed to timely approve State Implementation Plans ("SIPs") or promulgate Federal Implementation Plans ("FIPs") addressing the Act's regional haze requirements for multiple states. *See* EPA's Opposition to Motion to Enforce and Memorandum in Support of Cross-Motion to Terminate (ECF No. 105-1) ("EPA Mem.") at 9-10.[1] Under the Consent Decree resolving this suit, EPA's final obligation was to sign a notice of final rulemaking addressing the Act's Best Available Retrofit Technology ("BART") requirements for electric generating units ("EGUs") in Texas by approving a regional haze SIP, promulgating a regional haze FIP, or doing some combination of the two, by September 30, 2017. *Id.* at 10. EPA signed the required notice on September 29, 2017. *Id.*; *see also id.* at 1. Contrary to plaintiffs' assertions, there is no legitimate dispute that EPA's notice was a final action. Nor does EPA have any obligations remaining under the Decree.

At bottom, plaintiffs' arguments boil down to an improper request for this Court to review their objections to the substance and procedure of EPA's final action, in direct contradiction to the bifurcated judicial review scheme established by Congress and reaffirmed by the D.C. Circuit. *See Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987) (noting Act's "bifurcated jurisdictional scheme"). EPA's motion to terminate the Decree should therefore be granted.

[1] As plaintiffs note, EPA's memorandum was also docketed as ECF No. 104. Reply Mem. at 2 n.2. Under the District's ECF system, combined memoranda of this nature are typically e-filed twice: once in support of the affirmative motion (here, EPA's motion to terminate), and once in opposition (here, to plaintiffs' motion to enforce). This is simply a docketing measure and not, as plaintiffs suggest, an effort to gain the opportunity for additional argument. *See* Pl. Mem. at 17 n.11.

I. EPA'S SEPTEMBER 29 NOTICE SATISFIED EPA'S CONSENT DECREE OBLIGATION TO TAKE FINAL ACTION WITH REGARD TO THE BART REQUIREMENTS FOR TEXAS EGUS.

The facts underlying EPA's motion to terminate are not in dispute, and are set forth in EPA's Memorandum at 6-9. To summarize, in January 2017, EPA proposed to address the BART requirements for EGUs in the State of Texas. EPA Mem. at 8. EPA thereafter took public comment on its proposal. *Id.* After considering those comments, EPA signed a final rule on September 29, 2017. *Id.* On October 17, 2017, the final rule was published in the Federal Register. *See* 82 Fed. Reg. 48,324. Plaintiffs nonetheless argue that EPA "has not taken final action under the Act," and therefore has not satisfied its Consent Decree obligations. Plaintiff's Reply in Support of Motion to Enforce and in Opposition to Motion to Terminate (ECF 107) ("Pl. Opp.") at 3.

Notably, plaintiffs do not claim that EPA's September 29 notice is not "final action" within the meaning of the familiar *Bennett v. Spear* test. There is no dispute that it both marks the consummation of EPA's decisionmaking process and has legal consequences. 520 U.S. 154, 177-78 (1997). Nor do plaintiffs dispute that, at least as a matter of form, EPA followed all of the steps required by the Act. There was the issuance of a proposal, a period for public comment, and signature and publication of the Agency's final action. *See* 42 U.S.C. § 7606(d). Plaintiffs claim, however, that there is such a significant difference between EPA's proposal and its final action that although EPA followed the proper procedural steps, EPA effectively failed to provide the required notice and opportunity for comment.[2] *See* Pl. Opp. at 3, 4.

[2] Plaintiffs' non-finality argument rests on a mischaracterization of EPA's final rule. Plaintiffs focus their arguments on the portion of EPA's final rule that promulgated an intrastate trading program to satisfy the BART requirements for sulfur-dioxide emissions from EGUs, *see, e.g.*, Pl. Opp. at 4, 9-12. In the final rule, however, EPA also took final action with respect to other elements of the Texas regional haze SIP, including the identification of BART-eligible EGUs and the BART requirements for EGU emissions of oxides of nitrogen and particulate matter, as well as several other Texas SIP revisions that addressed interstate visibility transport requirements for various air quality standards. 82 Fed. Reg. at 48,361 (summarizing EPA's final action). Plaintiffs do not argue that EPA failed to adequately notice these aspects of the final rule, or that those aspects of the rule are not final for any

Plaintiffs stress that "notice and comment procedures are part and parcel of 'the promulgation' of a FIP," required by both the Act and the Decree. Pl. Opp. at 5-6; *see also id.* at 8-9. EPA of course does not dispute that it needed to employ notice-and-comment procedures – and it did so here. *See* EPA Mem. at 7-9. Under the Act and D.C. Circuit caselaw, however, plaintiffs' claim of inadequate notice and opportunity for comment must be raised to the Agency itself to remedy; only then can it go to the court of appeals. *See Mexichem Specialty Resins,* 787 F.3d at 553 (objections to adequacy of notice and comment are barred unless first raised to Agency in a petition for reconsideration); EPA Mem. at 17-19.

Plaintiffs attempt to evade this Congressionally-mandated review process. They assert that alleged notice-and-comment deficiencies are not actually challenges to final agency action that plaintiffs must first raise through a petition for reconsideration. *See* 42 U.S.C. § 7607(d)(9). Instead, plaintiffs claim that alleged notice-and-comment defects can somehow render an otherwise final agency action non-final. *See* Pl. Opp. at 2, 4, 5-6; *see generally id.* at 7-12, 15-16. Plaintiffs have cited no controlling authority to support this novel theory.

Lacking any such authority, plaintiffs contend that – as an adjunct to its authority to order EPA to perform a nondiscretionary duty – a district court may determine whether the agency has in fact taken the required action. *See* Pl. Opp. at 6, 7-10; *see also id.* at 11 (noting that under the Consent Decree, this Court retains jurisdiction to determine whether EPA has taken final action). As EPA has already explained, however, the facts in the outlying, unreported case that plaintiffs rely on only underscore how limited such an examination would be. The circumstances of the only cases plaintiffs cite are very different from this case. *See* Pl. Opp. at 8-9 (discussing *Sierra Club v. Whitman*, No. 1:00-cv-2206 (CKK), 2002 WL 393069 (D.D.C. Mar. 11, 2002) ("*Whitman*"), *adopted in part by*

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other reason. Nor do plaintiffs explain how a single agency action can be divided into "final" and "non-final" components.

Sierra Club v. Whitman, No. 00-2206 (CKK) (D.D.C. July 10, 2002) (Ex. D to Plaintiff's Statement of Position, ECF No. 103); EPA Mem. at 14-16. In *Whitman*, the plaintiff claimed that EPA had failed to make certain required determinations; the Agency, in turn, argued that actions taken several years before the case was filed had already satisfied this duty. *See Whitman* at *3; EPA Mem. at 14-15. The court held that a rule that was promulgated years prior to suit being filed, and that did not even cite the statutory provision at issue in the *Whitman* plaintiffs' suit, did not fulfill the duty at issue in the later lawsuit. See Statement of Position, Ex. D at 10-12; EPA Mem. at 15-16. Here, by contrast, EPA proposed to address the BART requirements for EGUs in Texas in January 2017 – and, following public comment, the Agency signed a notice finalizing BART requirements for EGUs in Texas on September 29.[3]

Plaintiffs further argue that the Congressionally-mandated reconsideration process is "simply an exhaustion requirement" that does not "excuse" a failure to conduct proper notice and comment. Pl. Opp. at 12; *see generally id.* at 12-16. It is true that the Agency reconsideration process is not an "excuse" for alleged Agency errors. It is, however, the only path to eventual judicial review. It was Congress's decision that objections like those Plaintiffs make here must first be raised with the Agency to consider and remedy (if appropriate) rather than being taken immediately to court.

Plaintiffs also object that following the review process established by Congress will "exacerbate the years-long delay in finalizing a regional haze plan for Texas," and will effectively grant EPA an extension of its Consent Decree deadline. Pl. Opp. at 2; *see also id.* at 15. Again, as discussed above and in EPA's prior briefing, EPA met its deadline. A regional haze plan for Texas

[3] Plaintiffs note that EPA did not address their claim that the Agency's September 29 notice was not a "logical outgrowth" of the January 2017 proposal. Pl. Opp. at 4. Nor will EPA do so here, although it reserves the right to contest plaintiffs' "logical outgrowth" argument in an appropriate forum. For reasons stated in the text and in EPA's prior briefing, *see* EPA Mem. at 12-19, that claim is not properly before this Court or within its jurisdiction. *See, e.g., Sierra Club v. Browner*, 130 F. Supp. 2d at 90 (CAA "does not allow district courts to address the content of EPA's conduct").

has now been finalized. There thus will be no further "delay" on that front, and no extension of the Consent Decree deadline is required. Nor is plaintiffs' concern with the pace of the administrative process a proper basis for refusing to terminate the Consent Decree. As the D.C. Circuit has noted, however "roundabout" the process may be, it is what Congress required. *EME Homer City Generation, L.P.,* 795 F.3d 118, 137 (D.C. Cir. 2015); EPA Mem. at 18-19.

Finally, the Court should not credit plaintiffs' hyperbolic assertions that, by terminating the Consent Decree, the Court would somehow countenance EPA's supposed adoption of "a totally new rule that has never been subject to public review." Pl. Mem. at 14; *see also id.* at 2 (asserting Court should "not countenance a sham rulemaking"), 9. Still less does EPA argue that it would be sufficient to sign a blank piece of paper titled "final rule" in order to fulfill its statutory or Consent Decree obligations. *See* Pl. Opp. at 1, 15. That is simply not what happened here. Instead, EPA signed a 57-page final rule of substance after considering numerous comments received during an extended comment period. Plaintiffs are free to pursue their contention that EPA failed to provide adequate notice and opportunity for comment in the appropriate forum. They cannot, however, use their dissatisfaction with EPA's final action as a basis for asserting that the Consent Decree should not be terminated because EPA never took that action at all, thereby subverting Congress's bifurcated jurisdictional scheme.

II. EPA HAS NO REMAINING OBLIGATIONS UNDER THE CONSENT DECREE.

Plaintiffs argue that EPA's Motion to Terminate should be denied because EPA has allegedly failed to satisfy certain Consent Decree requirements for Texas, Pennsylvania, and Nebraska. Pl. Opp. at 3, 17-19. EPA has, however, taken all of the actions that plaintiffs identify:

- The Consent Decree required EPA to sign a notice of final rulemaking addressing certain of the CAA's regional haze requirements, including the "reasonable progress" requirements, for

Texas and Oklahoma by December 15, 2015, and EPA did so. 81 Fed. Reg. 29 (Jan. 5, 2016). EPA's final action has been challenged in, and stayed by, the Fifth Circuit. *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016). The Fifth Circuit also granted EPA's motion for a voluntary remand *without* vacatur. Order, *State of Texas, et al. v. EPA*, No. 16-60118 (5th Cir. Mar. 22, 2017). EPA is in the process of reconsidering this final rule.

- The Consent Decree required EPA to sign a notice of final rulemaking addressing the CAA's regional haze requirements for Pennsylvania by November 15, 2012, and EPA did so. 77 Fed. Reg. 41,279 (July 13, 2012), *reissued at* 79 Fed. Reg. 24,340 (Apr. 30, 2014). On review, the Third Circuit upheld in part and vacated and remanded in part EPA's SIP approval. *Nat'l Parks Conservation Ass'n v. EPA*, 803 F.3d 151 (3d Cir. 2015). Pennsylvania is in the process of revising its SIP following the Third Circuit's ruling.
- The Consent Decree required EPA to sign a notice of final rulemaking addressing the CAA's regional haze requirements for Nebraska by June 15, 2012, and EPA did so. 77 Fed. Reg. 40,150 (July 6, 2012). On review, the Eighth Circuit upheld the majority of the final rule, *Nebraska v. EPA*, 812 F.3d 662 (8th Cir. 2016), and granted EPA's motion for a voluntary remand *without* vacatur of another portion of the rule so that EPA could reconsider certain adverse comments regarding one source and either provide a further response or propose new action, Order, *State of Nebraska, et al. v. EPA*, No. 12-3084 (8th Cir. Mar. 19, 2015). The matter remains under consideration by the Agency.

In all three instances, EPA indisputably took the final action required by the Decree. For purposes of EPA's motion to terminate, that is the end of the inquiry – subsequent events are simply irrelevant. *See Gorsuch*, 530 F. Supp. at 338-39. In *Gorsuch*, EPA met a court-ordered deadline to promulgate certain RCRA regulations. It then announced its intention to withdraw those regulations, and suspended their effective dates pending such withdrawal – actions that the plaintiffs

argued violated the Agency's court-ordered obligation. *Id.* at 339. The court rejected this argument, holding that once an agency has met its deadline, "the Court does not undertake a continuing supervision of the Agency's implementation of its responsibilities." *Id.; see also Environmental Defense Fund*, 713 F.2d at 812-13 (upholding district court on this point).

Still less should the Court deny EPA's motion to terminate the Decree based on Plaintiffs' speculation that EPA's September 29 action may be stayed or vacated. Pl. Opp. at 18. The D.C. District has previously rejected similar arguments as an "unavailing . . . attempt[] to root this Court's jurisdiction in the speculative possibility that a final agency action will be overturned." *Browner*, 130 F. Supp. 2d at 82-83. At bottom, plaintiffs are seeking to convert this Court's jurisdiction to grant an essentially *procedural* remedy – i.e., an order requiring EPA to take action by a particular date – into a never-ending vehicle for ensuring that EPA's action meets *substantive* statutory requirements. That role, however, is reserved for the court of appeals under 42 U.S.C. § 7607(b). If, on review in the court of appeals, EPA's September 29 action is found deficient in whole or in part, and is stayed or vacated in any respect, plaintiffs may then pursue whatever remedies are appropriate in a new lawsuit. *See* Pl. Opp. at 18 and n.13. For now, however, the outcome of any administrative or judicial review process remains wholly speculative, and provides no basis for this Court to refuse to terminate a Consent Decree with which, as discussed above, EPA has fully complied.

CONCLUSION

For the reasons stated above and in EPA's opening memorandum, EPA's Motion to Terminate should be granted.

Respectfully submitted,

JONATHAN BRIGHTBILL
Deputy Assistant Attorney General
Environment & Natural Resources Division

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/s/ *Eileen T. McDonough*
Eileen McDonough
Angeline Purdy
Environmental Defense Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-3126; (202) 514-0996
eileen.mcdonough@usdoj.gov
angeline.purdy@usdoj.gov

Of Counsel:

M. LEA ANDERSON
MATTHEW MARKS
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460
(202) 564-5571
anderson.lea@epa.gov